No. 96072-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

JERRY L. BARR,

Appellant,

v.

SNOHOMISH COUNTY SHERIFF,

Respondent.

BRIEF *AMICUS CURIAE*

OF

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTEREST OF AMICUS

On behalf of the Washington Association of Criminal Defense Lawyers, Schöen Parnell submits this brief in support of the appellant, Jerrry L. Barr. WACDL is a professional association made up of over 800 public and private Washington criminal defense lawyers and related professionals. Formed to promote fairness and equity in the criminal justice system, WACDL files this brief in pursuant of that mission.

IDENTITY AND INTEREST OF AMICUS CURIAE

WACDL, a non-profit organization formed in 1987, is dedicated to improving the quality and administration of justice. WACDL members are committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL holds seminars throughout the year to educate lawyers, paralegals and investigators on pertinent issues related to the defense of Washington citizens accused of all crimes, from capital cases to misdemeanors and infractions.

WACDL has previously been granted amicus status in numerous Washington appellate cases and has been, on occasion in the past, invited by the Supreme Court to file amicus briefing.

INTRODUCTION

Individuals who seek to restore their right to possess firearms in Washington are given a choice in where to file their petition. RCW 9.41.040(4)(b) permits the filing either in the Superior Court in the county in which they reside, or in the court of record that ordered the prohibition.[1] Snohomish County, however, has neutered this second option when the "court of record that ordered the prohibition" happens to be the Snohomish County Juvenile Court. Under SCLCR 3(a), the county will not permit a restoration of firearm rights petition to be filed in Juvenile Court; instead the county mandates that all firearm restoration petitions be filed in Superior Court, under a civil cause number, pursuant to the civil rules. [2] This necessarily creates a new separate court record of a juvenile conviction that will be open to the public.

ARGUMENT: The Sheriff Endorses A Hobson's Choice Between Giving Up One's Right To Privacy And One's Right To Keep And Bear Arms.

If this Court overturns the Court of Appeals decision, individuals like Jerry Barr who seal their Snohomish County Juvenile Court

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[1] For example, a Whatcom County resident with a felony conviction from Snohomish County Superior Court can file a petition to restore their firearm rights in either the Whatcom County Superior Court or the Snohomish County Superior Court.

[2] And this seems to be the practice of most Washington counties – mandating that juvenile convictions be treated like adult convictions when it comes to restoring firearm rights.

conviction are left with a Hobson's choice. Do they give up their firearm rights so they can enjoy the privacy obtained when their juvenile conviction was sealed? Or do they give up their privacy so they can have their firearm rights restored?

Firearm Rights

The Second Amendment right to keep and bear arms is accorded to citizens in the State of Washington through the due process clause of the Fourteenth Amendment. *State v. Sieyes*, 168 Wn.2d 276, 225 P.3d 995 (2010). And under article I, section 24 of the Washington State Constitution, the right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired.

Privacy Rights

Likewise, Washington State citizens have a right to privacy accorded through the federal constitution and article 1, section 7 of the Washington State Constitution. A citizen has a privacy interest in his or her own identity. *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977); *State v. Surge*, 160 Wn.2d 65, 71-72, 156 P.3d 208 (2007). The State Constitution "'clearly recognizes an individual's right to privacy with no express limitations' and places greater emphasis on privacy than does the Fourth Amendment." *Robinson v. City of Seattle*, 102 Wn. App. 795, 809, 10 P.3d 452 (2000) (quoting *State v. Ladson*, 138

Wn.2d 343, 348, 979 P.2d 833 (1999) (quoting *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994)).

However, the Washington State Supreme Court has not recognized an individual's interest in confidentiality as a fundamental right under either the federal or state constitution. *State v. Sanchez* 177 Wn.2d 835, 306 P.3d 935 (2013); *O'Hartigan v. Dep't of Pers.,* 118 Wn.2d 111, 117, 821 P.2d 44 (1991). Instead, in the context of confidentiality, the Court has recognized two types of privacy:

> the right to nondisclosure of intimate personal information or confidentiality, and the right to autonomous decision making. The former may be compromised when the State has a rational basis for doing so, while the latter may only be infringed when the State acts with a narrowly tailored compelling state interest.

In re Juveniles A, B, C, D, E, 121 Wn.2d 80, 847 P.2d 455 (1993).

ARGUMENT: The Sheriff Endorses Violating Both The Right To Confidentiality And The Right To Autonomous Decision Making.

The Court of Appeals correctly summarized the effect of the sealing statute when they wrote:

> the sealing statute here relieves the person receiving the sealing order from the obligation to disclose the adjudication in response to "any inquiry"…[it] treats the adjudication as not existing, and therefore, no affirmative duty to disclose the adjudication in response to a question exists.

Barr v. SnoCo Sheriff, No. 50623-8-II (2018).

And yet the Sheriff's argument mandates a duty to disclose if Barr or any other individual with a sealed juvenile conviction wishes to exercise their right to keep and bear arms. Had the Court of Appeals agreed with the Sheriff, to get his Concealed Pistol License Barr would have to file a petition to restore his firearm rights in the Snohomish County Superior Court which requires the paying of a civil filing fee ($240) and the creation of a new civil cause number, the filing of a petition and a SWORN DECLARATION which requires disclosure of a conviction/adjudication and it's case number, the date of conviction, the sentencing court, proof that he completed the terms and conditions of his sentence and documentation that he served his sentence so the superior court judge can determine when the 5 years of lawful behavior has been met. All of this information that a superior court judge needs for rendering a decision on restoration is the same information that was sealed by the juvenile court, and is precisely what the sealing statute says he does not have to disclose. Yet the Sheriff would have individuals with sealed juvenile convictions file a petition to restore under a civil cause number in superior court, which would then create a new record of a (sealed) conviction that would be open to the public. That is an "absurd result" in its purest form.

Under the Sheriff's approach, someone with a sealed Snohomish County Juvenile Court conviction will be deprived of what would otherwise be an autonomous decision to seek restoration of a constitutional right – deprived by the County's action in threatening to violate the petitioner's right to confidentiality should a petition for restoration be filed.

Policy Implications

From a policy standpoint, there is a substantial need for juvenile court records to remain confidential. "A publicly available juvenile court record has very real and objectively observable negative consequences, including denial of "housing, employment, and education opportunities." Leila R. Siddiky, Note, *Keep the Court Room Doors Closed So the Doors of Opportunity Can Remain Open: An Argument for Maintaining Privacy in the Juvenile Justice System, 55 How. L.J. 205, 232 (2011)*. In fact, a single juvenile offense could result in an eviction of the juvenile's entire family. *Id.*, at 236.

An open juvenile court record could foreclose employment possibilities, particularly given those employers who view people convicted of prior crimes as a class that will "adopt an opportunistic attitude, choosing to act upon their criminal predisposition when the opportunity arises." *Siddiky*, supra, at 236. An open juvenile record can

make it difficult to obtain a high school diploma, much less a college degree, *Id.* Instead of preventing recidivism, exposing juvenile records to the public almost guarantees it.

As the Washington State Supreme Court has recognized, in the context of finding an *Ishikawa* analysis unnecessary prior to sealing juvenile records in light of statutes governing sealing,

> The stigma of an open juvenile record and the negative consequences that follow are particularly unjustifiable in light of the fact that the mind of a juvenile or adolescent is measurably and materially different from the mind of an adult, and juvenile offenders are usually capable of rehabilitation if given the opportunity.
>
> The legislature's approach also recognizes that open juvenile records implicate and exacerbate racial disparities. It is well documented that juveniles of color face disproportionately high rates of arrest and referral to juvenile court. Combined with the indisputable detrimental effects of open juvenile records, the racial imbalances in the juvenile justice system create and perpetuate barriers to economic and social advancement that vary, in the aggregate, on the basis of race.

State v. S.J.C. 183 Wn.2d 408, 352 P.3d 749 (2015) (internal citations omitted.)

Hobson's Choice

Detached reflection cannot be demanded in the presence of an uplifted knife. *State v. Bradley*, 141 Wn.2d 731, 744, 10 P.3d 358 (2000) Sanders, dissenting, quoting Justice Oliver Wendell Holmes, *Brown v.*

United States, 256 U.S. 335, 343, 41 S. Ct. 501, 65 L. Ed. 961, 18 A.L.R. 1276 (1921). A "Hobson's Choice" is defined as:

> the necessity of accepting one of two or more equally objectionable things. The term originated as a reference to the practice of Thomas Hobson, a 17th century English liveryman, of requiring every customer to take the horse which stood nearest the door.

Webster's Third New International Dictionary 1076 (1976).

While a Hobson's choice thus correctly occurs when a person is offered essentially no choice at all, in the criminal context, the phrase usually suggests that a person has been put in a position requiring him to choose between two equally objectionable alternatives, generally being forced to waive one right in order to preserve another. *See State v. Michielli*, 132 Wn.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of case where defendant was forced to choose between waiving right to speedy trial or right to effective assistance of counsel when an amended information adding charges was filed four days prior to trial without explanation.); *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant).

Aside from the choice, as in *Michielli* and *Price*, between speedy trial and effective assistance of counsel, cases dealing with other kinds of Hobson's choices are few. While the following cases deal with Hobson's

choices in various contexts, the main theme appears to be a showing of prejudice on the part of the defendant (through being forced to make this kind of choice) in order to trigger a remedy. This differs from the standard of egregious government misconduct required for dismissal under the speedy trial line of Hobson's choice cases.

A defendant's Hobson's choice between forfeiting the opportunity to testify and risking the prejudice of impeachment via prior convictions was touched upon in *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). There, the Washington State Supreme Court acknowledged that this had been a basis under previous cases to support a narrow construction of ER 609(a)(2), but held that, "as hard as this choice may be for a defendant, requiring such choices is not inconsistent with the criminal process, as we discussed elsewhere in this opinion." *Id.* at 553. Concluding that a defendant "has no right to testify free of impeachment, and that the purpose of ER 609(a)(2) is to permit admission of evidence affecting the credibility of the witness," the Court overturned *State v. Burton*, 101 Wn.2d 1, 676 P.2d 975 (1984) and allowed prior theft convictions to come in under ER 609. *Id.* at 545. It was in *Brown* that the non-constitutional harmless error standard for admission of prior convictions under ER 609 came into being. *Id.* Finding that any error in this case was harmless, the court affirmed the conviction.

State v. Hardy, 133 Wn.2d 701, 711, 946 P.2d 1175 (1997) examined the same Hobson's choice analyzed in *Brown*, but this time in the context of prior drug convictions. Acknowledging that the evidence of prior convictions was "inherently prejudicial," the *Hardy* Court found that prior drug convictions were not probative of dishonesty. *Id.* As in *Brown*, the Court conducted a harmless error analysis prior to remanding for a new trial. *Id.* at 713.

In *State v. Rich*, 63 Wash. App. 743, 746-8, 821 P.2d 1269 (1992), the defendant was faced with a Hobson's choice when the State sought to re-open its case after failing to prove a necessary element of the crime – the identity of the defendant – and in response to a defense motion to dismiss, the court gave the defense a choice between allowing the State to re-open the case or to declare a mistrial. The defense objected to both options, and a mistrial was declared over the defendant's objection. *Id.* The Court found that in this case, a mistrial constituted a violation of Mr. Rich's double jeopardy rights, holding that "failure to select either of two unfavorable options cannot be considered consent to the declaration of a mistrial." *Id.*

A unique Hobson's choice was examined in *State v. Langford*, 12 Wn. App. 228, 229-230, 529 P.2d 839 (1974). There, Ms. Langford was convicted for possession of heroin and sentenced to a prison term not to

exceed 10 years. In support of probation in lieu of the prison term, defense counsel reported that his client had been cooperative with him, was seeking vocational training, had an infant son, and that this was her first adult offense. *Id.* at 229. However, because police reports indicated that Ms. Langford was a small cog in a large drug distribution enterprise, the trial court offered probation only on the condition that Ms. Langford reveal the identity of her drug sources. *Id.* Ms. Langford was required to respond in open court at the time of sentencing. *Id.* On appeal, Division II held that it was "unreasonable for a defendant to be confronted with the Hobson's choice of either jeopardizing one's safety by publicly becoming an informer or going to prison." *Id.* The Court concluded that the conditions attached to the granting of probation were unreasonable due to the likelihood of harm to Ms. Langford. *Id.* at 230. Observing that the damage had already been done once the trial court demanded an answer on the record, the Court remanded for re-sentencing. *Id.*

While these cases all required a showing of prejudice for a remedy to follow, even a likelihood of harm was enough prejudice in *Langford*. This is an easy burden for Jerry Barr and other similarly situated petitioners with sealed juvenile convictions who want their firearm rights restored. The prejudice of a juvenile crime becoming a matter of public record is clear, as set forth earlier in this brief. And the prejudice inherent

in the denial of firearm rights would bar a citizen from certain job paths, notably law enforcement or a military career. There are of course other negative consequences inherent in the denial of firearm rights, from the bar to defense of home and family to a possibly less prejudicial bar to recreation or providing food for a family by hunting.

By affirming the Court of Appeals decision, individuals who have had their juvenile convictions sealed will no longer be forced into a Hobson's choice. They will not have to choose between 1. Putting their sealed private information out in the public just so they can restore their firearm rights, and 2. Keeping that private information private by giving up their right to keep and bear arms.

ARGUMENT: If This Court Overturns The Court Of Appeals' Decision, The Only Remedy For The Hobson's Choice Is To Declare SCLCR 3(a) Unconstitutional.

"[T]he power to prescribe rules for procedure and practice" is an inherent power of the judicial branch, *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974), and flows from article IV, section 1 of the Washington Constitution, *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). In a case where a statute and a court rule are in conflict, the court rule will prevail in procedural matters and the statute in substantive matters. *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 980,

216 P.3d 374 (2009). The designation of the proper court for filing a petition appears to be a procedural, rather than substantive, matter.

A statute or rule is unconstitutional on its face if there are no "circumstances where [it] can constitutionally be applied." *In re Det. of D.F.F.*, 144 Wn. App. 214, 226, 183 P.3d 302 (2008), *quoting Republican Party*, 141 Wn.2d at 282 n.14 (citing *In re Det. of Turay*, 139 Wn.2d 379, 417 n.28, 986 P.2d 790 (1999)).

In *State v. Fleming*, 41 Wn. App. 33, 701 P.2d 815 (1985), Division Three declared a district court local rule unconstitutional when it conditioned a right to a jury trial on the defendant's presence and participation in a pre-trial conference. Counsel, but not Mr. Fleming, received notice of jury trial and the attendant pre-trial conference. *Id.* at 35. Counsel appeared at the pre-trial conference, which Mr. Fleming did not attend. *Id.* The district court struck the jury demand due to the failure of Mr. Fleming to personally appear. *Id.* The Court of Appeals reversed because Mr. Fleming was not personally notified that his failure to appear would result in the loss of a jury trial. *Id.* However, the Court concluded that even if notice had been given, taking away his right to a trial by jury as a sanction is unconstitutional. *Id.* at 36. The Court held that "procedural rules of court cannot be used to take away substantive rights." *Id, citing State v. Fields*, 85 Wn.2d 126, 530 P.2d 284 (1975); *State v. Pavelich*, 153

Wash. 379, 279 P. 1102 (1929); *In re Marriage of Hermsen*, 27 Wn. App. 318, 617 P.2d 462 (1980). The Court held that the portion of the local rule authorizing the striking of a jury trial for a failure to appear at the pre-trial conference was unconstitutional. *Id.*

The reasoning in *Fleming* applies in Jerry Barr's case. Here, the local rule is essentially conditioning the right to bear arms on waiver of a right to privacy. The local rule, like that examined in *Fleming,* is arguably a procedural rule in that it dictates where a case should be filed, and effectively takes away a substantive privacy right in so doing. Though the rule may not be unconstitutional on its face, as was the rule in *Fleming,* it remains unconstitutional as applied in every firearm restoration petition involving a juvenile conviction.

CONCLUSION

Although the judiciary is encouraged to make local procedural rules, SCLCR 3(a) is unconstitutional UNLESS "treated as if they never occurred" really means just that. This Court should affirm the ruling of the Court of Appeals.

Respectfully submitted on 11/28/2018,

/s/ Schöen Parnell
Schöen Parnell, WSBA #32450
for, WACDL *Amicus* Committee

DECLARATION OF SERVICE

I , Schöen Parnell, being of sound age and mind, declare that on the *28th* day of *November*, 2018, I served the foregoing WACDL BRIEF *AMICUS CURIAE* upon the Snohomish County Sheriff and upon the Attorney for Mr. Barr by uploading it using the Court's e-filing application and emailing a copy of the document using that process to ldowns@snoco.org and to vitaliy@kertchenlaw.com.

/s/ Schöen Parnell
Schöen Parnell

PARNELL DEFENSE, PLLC

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